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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ANDREW JAMES STEWART, Defendant and Appellant.	E063880 (Super.Ct.No. FMB1200015) OPINION

APPEAL from the Superior Court of San Bernardino County. Michael A. Smith (retired judge of the San Bernardino Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.), and Rodney A. Cortez, Judges. Dismissed.

William G. Holzer, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, A. Natasha Cortina and Alastair J. Agcaoili, Deputy Attorneys General, for Plaintiff and Respondent.

On November 4, 2014, the voters approved the Safe Neighborhoods and Schools Act (Proposition 47), which allows a person convicted of a felony prior to its passage, who would have been guilty of a misdemeanor under Proposition 47, to petition the court to reduce his or her felony to a misdemeanor and be resentenced. The proposition created Penal Code section 1170.18, which sets forth the guidelines for filing such a petition.

Defendant and appellant Andrew James Stewart was convicted of two felonies in this case—child endangerment and evading a police officer—which are not eligible under Penal Code section 1170.18. In a separate proceeding, defendant had two of his felony convictions, which were used in this case to enhance his sentence under Penal Code section 667.5, subdivision (b), reduced to misdemeanors. In this case, defendant filed both a petition for writ of habeas corpus and made a request to modify his sentence, arguing that since his prior convictions were now misdemeanors, they should be dismissed and his sentence in this case must be reduced. Defendant appeals the trial court's refusal to dismiss the two prior convictions because he insists that under Proposition 47, once his prior felony convictions were reduced to misdemeanors, they could no longer be used to enhance his sentence in this case. For the reasons set forth in this opinion, we dismiss the appeal.

FACTUAL AND PROCEDURAL HISTORY

On January 10, 2012, a felony complaint was filed in San Bernardino County case No. FMB1200015 charging defendant with evading a police officer (Veh. Code, § 2800.2, subd. (a)) and child endangerment (Pen. Code, § 273a, subd. (a)). He was also charged with having suffered three prior felony convictions for which he served a prior

prison term within the meaning of Penal Code section 667.5, subdivision (b). Two of those convictions were for violating Health and Safety Code section 11377, subdivision (a).[1]

On January 31, 2012, defendant admitted all of the allegations in the complaint in order to qualify for drug court. Defendant was accepted into drug court. Defendant was subsequently terminated from drug court. On March 3, 2014, he was sentenced to state prison for a period of nine years eight months, which included three years for the prior prison term enhancements.

On February 18, 2015, defendant filed an in propria persona petition for writ of habeas corpus. Defendant alleged that the "court" imposed an illegal enhancement. He stated, "I was given three prison prior enhancements and I only have two. Also one or both my prison priors fall under the new Prop-47." The matter was heard on April 3, 2015. The trial court construed the habeas petition to be a petition filed pursuant to Proposition 47; defendant was represented by a deputy public defender.

The entirety of the hearing held on April 3, 2015, was as follows: "The petitions to reduce the convictions to misdemeanors and for resentencing as a misdemeanor is denied in the following cases [defendant's name was called]. [¶] Due to the nature of the charges, the defendant is not eligible for reduction to a misdemeanor pursuant to Prop 47. So the petitions are denied . . . ." No appeal was filed.

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[1] A violation of Health and Safety Code section 11377, subdivision (a) is now a misdemeanor pursuant to Penal Code section 1170.18. Defendant requested that we take judicial notice of the orders reducing his prior convictions to misdemeanors but we deny the request as it is not relevant to the issues to be resolved in this appeal.

On June 10, 2015, defendant's counsel appeared along with the People on a motion by defendant's counsel. Defendant's counsel stated, "Joel Agron for [defendant]. He is in custody. It is my motion that the Court recall the motion that was called May of last year so it can be recalculated based on Prop. 47 reduction of two of the three prison priors in which he was sentenced." The People responded, "Your Honor, it's the People's position that he is not eligible based on the fact that he has already served the prison term. But we will submit." The trial court ruled, "The court does not have jurisdiction to resentence the defendant. He was sentenced by this court to county prison on March 3rd, 2014. The motion is denied."

On June 10, 2015, defendant filed a notice of appeal. He appealed from the "motion for re-sentencing post-Prop 47. Prison priors no longer felonies."

DISCUSSION

Defendant contends on appeal that the trial court's "ruling" was "unlawful under the plain text of [Penal Code] section 1170.18, subdivision (k), it was in contrast to the clear intent of the electorate who passed Proposition 47, and it violated the equal protection clauses of the state and federal constitutions." Defendant does not specify from which ruling he is appealing. The trial court first denied his petition for writ of habeas corpus, which it construed as a petition under Proposition 47. The court then denied defendant's request to modify his sentence. He is not entitled to relief on either order.

To the extent that defendant is appealing the denial of his petition for writ of habeas corpus, which the trial court, without objection, construed as a petition to recall

his sentence under Penal Code section 1170.18, he failed to file a timely notice of appeal from the order. As stated, the trial court construed his petition for writ of habeas corpus as a petition under Proposition 47. That petition was denied on April 3, 2015. California Rules of Court rule 8.308 requires that a notice of appeal be filed "60 days after the rendition of the judgment or the making of the order being appealed." As such, defendant's notice of appeal filed on June 10, 2015, was too late to appeal the denial of the petition. Defendant has made no argument that he tried to file an appeal from the April 3, 2015, order.

To the extent defendant's appeal is from the finding of the trial court on June 10, 2015, in which the trial court ruled it lacked jurisdiction to modify his sentence, he is not entitled to appellate relief. Defendant claims on appeal that the trial court should have struck the prior prison term allegations pursuant to Penal Code section 1385 at the June 10, 2015, hearing regarding his motion to modify his sentence. However, as discussed *post*, the trial court lacked jurisdiction to modify his sentence.

Here, the minute order from the June 10, 2015, hearing states that the "Action came on for Modification of Sentence. Defense oral motion to modify sentence is DENIED. Court no longer has jurisdiction." No petition or motion filed by defendant in conjunction with this hearing appears in the record. Further, at the hearing, the trial court noted that it could not "resentence the defendant" because he was sentenced to county prison in March 2014. It is clear that the trial court never construed the request by defendant to strike his prior convictions as a petition to recall his sentence pursuant to

Proposition 47. Rather, the trial court construed the request as a motion to modify his sentence and defendant has not argued otherwise.

"[G]enerally a trial court lacks jurisdiction to resentence a criminal defendant after execution of sentence has begun." (*People v. Howard* (1997) 16 Cal.4th 1081, 1089.) Clerical errors can be corrected once a defendant has begun execution of the sentence but judicial errors may not be corrected. (*People v. Hyung Joon Kim* (2012) 212 Cal.App.4th 117, 123-124.) Further, "'Our case law has construed [Penal Code] section 1385 to permit a court to dismiss individual counts in accusatory pleadings [citation], sentencing enhancements [citation], allegations that the defendant has suffered a prior conviction [citation], and allegations that the defendant has suffered a prior "strike."' [Citation.] But the section 'has never been held to authorize dismissal of an action after the imposition of sentence and rendition of judgment.'" (*Id.* at pp. 122-123.)

In *People v. Turrin* (2009) 176 Cal.App.4th 1200, the defendant sought to have his restitution fines modified 10 months after judgment was entered while he was serving his sentence in state prison. The defendant insisted that there was insufficient evidence of his ability to pay, to support imposition of the fine. The request was denied and the defendant appealed. (*Id.* at pp. 1203-1204, 1205-1206.) The appellate court first noted that "[a] trial court may correct a clerical error, but not a judicial error, at any time. A clerical error is one that is made in recording the judgment; a judicial error is one that is made in rendering the judgment." (*Id.* at p. 1205.) The appellate court rejected that the restitution fine was a clerical error. It also noted that an unauthorized sentence may be corrected at any time. However, it also noted, "'The unauthorized sentence exception is

"a narrow exception" to the waiver doctrine that normally applies where the sentence "could not lawfully be imposed under any circumstance in the particular case," for example, "where the court violates mandatory provisions governing the length of confinement." [Citations.] The class of nonwaivable claims includes "obvious legal errors at sentencing that are correctable without referring to factual findings in the record or remanding for further findings."'" (*Id.* at p. 1205.) The appellate court concluded the claim that a restitution fine was improperly imposed was not an unauthorized sentence. (*Id*. at pp. 1205-1206.)

In addition, the *Turrin* court concluded that since the trial court lacked jurisdiction, that the appeal should be dismissed. It found, "Section 1237, subdivision (b), provides that a defendant may appeal '[f]rom any order made after judgment, affecting the substantial rights of the party.' Since the trial court lacked jurisdiction to modify the restitution fines, its order denying defendant's motion requesting the same did not affect his substantial rights and is not an appealable postjudgment order. [Citation.] The appeal should be dismissed." (*People v. Turrin*, *supra*, 176 Cal.App.4th at p. 1208.)

Here, defendant made a motion to modify his sentence to dismiss the prior convictions almost one year after he was sentenced to nine years eight months in prison. At the time that the trial court imposed the enhancements, the prior convictions were felonies that certainly qualified under Penal Code section 667.5, subdivision (b). Further, none of the exceptions apply here. This was not a clerical error. Moreover, defendant was not subject to an unauthorized sentence. Several courts have found that Proposition

47 does not affect enhancements pursuant to Penal Code section 667.5, subdivision (b) for cases where the judgment imposing the enhancement has become final.[2]

Here, defendant did not file a timely appeal from the denial of the petition to recall his sentence. In addition, the trial court lacked jurisdiction to modify defendant's sentence. The finding by the trial court that it lacked jurisdiction to modify his sentence did not affect defendant's substantial rights and is not an appealable postjudgment order. The appeal is properly dismissed.

DISPOSITION

The appeal is dismissed.

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MILLER
J.

We concur:

HOLLENHORST
Acting P. J.

SLOUGH
J.

[2] We note that the California Supreme Court granted review on this issue on March 7, 2016, in *People v. Valenzuela*, S232900. However, this does not render defendant's sentence "unauthorized."